IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1258

The State of Minnesota, by
Warren Spannaus, its Attorney General, *Petitioner*,

vs.

First of Omaha Service Corporation, *Respondent*.

No. 77-1265

The Marquette National Bank
of Minneapolis, *Petitioner*,

vs.

First of Omaha Service Corporation, *Respondent*.

**On a Writ of Certiorari to the
Supreme Court of Minnesota**

MOTION OF THE CONSUMER BANKERS ASSOCIATION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

and

BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

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MOTION OF THE CONSUMER BANKERS ASSOCIATION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

The Consumer Bankers Association ("The Association") respectfully moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached

brief as *amicus curiae*. In accordance with the provisions of that Rule, The Association has sought the consent of the parties for leave to file as *amicus*. The Respondent has provided its consent. However, the Petitioner Marquette National Bank has refused to consent, and the Petitioner State of Minnesota has failed to respond to Association inquiries regarding The Association's potential participation.

The Association is a non-profit organization which was organized in October 1919 to provide a voice for the consumer banking industry. Since that time, the membership of The Association has grown to over 300 commercial banks of all sizes which are actively engaged in extending consumer credit. Combined, the members of The Association extend over 50% of all consumer credit outstandings held by commercial banks. Their consumer credit outstandings total more than $54,750,000,000.

Over one-half of The Association's members are national banks which engage in a substantial volume of interstate credit transactions on a continuing basis. The active, day-to-day operations of these banks, developed over many years, are based upon the authority contained in the National Bank Act as it has been interpreted and applied since 1874.

The Association is vitally interested in having this Court sustain the position advanced by the Respondent First Omaha Service Corporation ("Service Corporation"). The complex issues raised in this case have an impact well beyond the scope of operations of the Service Corporation and clearly beyond the geographical boundaries of Minnesota. The resolution of these complex issues will have a substantial impact on

the existing national banking system. These vital interests can be represented adequately only through an examination of those issues from the perspective of a large number of interstate lenders which are representative of the entire country.

The Association believes that the full scope of these issues should be presented to the Court. The ramifications of these issues extend far beyond the facts of this case and should be examined and discussed from diverse perspectives.

Of particular concern to The Association is the suggestion that 114 years after its adoption, the National Bank Act should be reinterpreted to create "equality" between state banks and national banks. Such a substantial departure from prior interpretation would have an impact on virtually all national banks which engage in interstate lending. Furthermore, certain arguments have been presented to this Court which are based upon incorrect or obsolete economic considerations.

A decision on the merits of this case will directly influence the banking practices of most of The Association's members. The adoption by this Court of the position to be presented by The Association would dispose of this case in a manner consistent with the historical context of the National Bank Act, the legislative history of the Act, prior judicial and administrative interpretations and the decisions of the three courts which have recently considered the specific issue presented.

Respectfully submitted,

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BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

The Consumer Bankers Association ("The Association") respectfully submits this Brief as *amicus curiae* in support of the Respondent.

INTEREST OF AMICUS CURIAE

The Association consists of more than 300 commercial banks of all sizes, over one-half of which are national banks. These banks engage in a substantial volume of interstate credit transactions on a continuing basis. The active, day-to-day operations of these banks, developed over many years, are based upon the authority contained in the National Bank Act, adopted in 1864, as it has been consistently interpreted and applied since 1874.

Due to this extensive interstate lending activity, The Association is greatly interested in seeing that the position advanced by Respondent First Omaha Service Corporation ("Service Corporation") be sustained by this Court. The complex issues raised in this case have a substantial impact well beyond the scope of operations of the Service Corporation and clearly beyond the geographical boundaries of Minnesota. The resolution of those issues will have a substantial impact on the existing national banking system. These vital interests can be represented adequately only through an examination of those issues from the perspective of a large number of interstate lenders representing the entire country. The ramifications of this case extend far beyond its specific facts.

In this case, Petitioner Marquette National Bank sought to enjoin the First National Bank of Omaha (subsequently dismissed from the suit by Petitioner) and Respondent Service Corporation from offering a Nebraska-based credit card program to Minnesota residents. The First National Bank of Omaha is located in Nebraska, which permits interest on revolving credit accounts at 18% for the first $999 of the unpaid balance

and 12% on any unpaid balance of $1,000 or more. Petitioners argue that a Minnesota statute, which limits state banks to 12% plus authorizing an annual service charge of up to $15, should apply to the Nebraska national bank card program. The decision below properly found that the program operated by Service Corporation could appropriately look to the Nebraska statute. This factual setting is a familiar one recognizable to many national banks which are interstate lenders. In considering the implications of this case as applied to these interstate lenders, The Association finds particularly troublesome the suggestion that 114 years after its adoption and 104 years after it was first interpreted by this Court, the National Bank Act should be reinterpreted to create interest rate "equality" between state banks and national banks. This substantial departure will have an impact on virtually all national banks which engage in interstate lending. Furthermore, certain arguments have been presented to this Court which are based upon incorrect or obsolete economic data. The Association, its members and the consumers they serve, all have a vital interest in placing accurate data before this Court.

The Association is interested in assuring the continued ability of national banks all over the country to look at and rely upon the National Bank Act as they carry out interstate banking activities. If national banks are unable to rely upon the plain language of that Act, as consistently interpreted by this Court, the stability and viability of our national banking system will be endangered.

SUMMARY OF ARGUMENT

Assuming that the Court has jurisdiction to decide the merits of the case,[1] The Consumer Bankers Association submits that the legislative history of 12 U.S.C. § 85, the consistent decisions of this and other Courts in the 114 years since enactment of Section 85, and sound economic policy support the decision of the Supreme Court of Minnesota. A national bank located in Nebraska may charge interest on all its loans, including interstate loans to consumers in Minnesota, at the highest lending rate permitted by Nebraska law to any lender. The Nebraska bank is not limited by a lower interest rate established by Minn. Stat. § 48.185 for its state banks.

Petitioners suggest that the questions presented here must be analyzed against a background of "competitive equality" with respect to the interest rates which national and state banks are empowered to assess. In point of fact, however, Congress did not intend for competitive equality to exist between state and national banks when it enacted federal banking statutes in 1863 and 1864 and attempted to tax state banks out of existence in 1865. Congress intended to favor national banks. Specifically, the Congressional debate on Section 30 of the National Bank Act of 1864, now Section 85, makes clear that the final version was designed to prevent states from passing interest rate legislation hostile to national banks and to permit national banks to make loans at an interest rate equal to the highest rate permitted to be charged by *any lender* in the state. National banks were not to be tied to the rate applicable to state banks which might be lower.

As recognized since this Court's *Tiffany* decision in 1874, Section 85 places national banks in the position of most favored lenders on the critical issue of maximum permissible interest rates. The policy of "equalization" between national and state banks upon which the Petitioners rely so heavily simply lacks merit in the area of interest rates; the cases cited by the Petitioners involve either instances in which this Court recognized "equality" for the purpose of giving national banks equal advantages with state banks or looked to that principle when either silence or the absence of conflicting language in the National Bank Act led this Court to conclude there was little Congressional interest in the area regulated.

The plain meaning of Section 85 is that a national bank can charge the highest interest rate allowed to any lender of the state where the bank is located, which may or may not be the same rate allowed state banks. Moreover, the national bank can charge that rate on all its loans, irrespective of geographical or political boundaries. The "except" clause of Section 85, as made clear by the Congressional debates and as

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[1] The Association is proceeding under the assumption that the Petitions for Writ of Certiorari were filed in a timely manner. The Court's footnote in *United States* v. *Adams*, 383 U.S. 39 (1966), suggests strongly that the jurisdictional requirement contained in 28 U.S.C. § 2101(c) has not been met by the Petitioners. "Where a timely motion [for rehearing] is filed, the time in such cases *runs from the date of the order overruling the motion*." 383 U.S. at 41 n.1 (Emphasis added). Accordingly, the Association respectfully submits that the Court lacks jurisdiction in this case.

The Association must also point out that the Respondent in this case is not an issuer of credit cards, does not extend credit and, of course, is not a national bank. Although the decision below seems to treat the First National Bank of Omaha as though that national bank were before it, that is not factually accurate. The Association questions the appropriateness of a decision being rendered in this case on a point of critical importance to national banks when a national bank is not even a party to the proceeding.

properly analyzed by this Court in *Tiffany* and more recently by the Seventh and Eighth Circuits in the *Fisher* cases, is an enabling clause, not a restrictive one. If a higher interest rate is applicable to state banks, then national banks are "allowed" to take advantage of that higher rate. On the other hand, to the extent that Minnesota law sets a lower rate for state banks which, if imposed on national banks, would conflict with the right conferred by the paramount federal statute, the Minnesota statute is preempted.

Sound economic reasons exist for providing national banks the type of interest flexibility contemplated by Congress and enunciated by the courts since the enactment of Section 85. Low state interest rate ceilings do *not* protect the consumer; in fact, more often than not, they cause the true cost of credit to be hidden or an unreasonable reduction in the supply of credit available to credit-worthy consumers. Furthermore, existing data indicate that there is vigorous competition among lenders, as well as widespread awareness by consumers of the cost of borrowing money. If unrestrained by price controls, a competitive credit market will produce social results fair to consumers, fair to lenders and beneficial to the economy as a whole. The decision of the Supreme Court of Minnesota fosters that competition in the interstate credit market. To reverse the decision of the Supreme Court of Minnesota and 104 years of precedent, however, would have an adverse impact upon the current expansion of interstate lending.

The Minnesota statute (§ 48.185), which the Petitioners seek to have apply to interstate loans made to Minnesota consumers, limits the rate of interest that Minnesota state banks and savings banks can charge on open-end revolving credit card transactions. Yet,

higher rates are allowed by Minnesota to small loan companies making loans to Minnesota consumers (§ 56.13). Under the most favored lender doctrine, a national bank may take advantage of the highest lending rate in the state and is not restricted to a lower rate provided for state banks. National banks, whether located in Minnesota, Nebraska or any other state, are not subject to restrictions placed by Minnesota on its state banks in light of favoritism extended to other Minnesota lenders. That is precisely the objective sought by Congress in enacting Section 85.

The interpretation and policy of Section 85 have been clearly established for over 104 years, and should not be reinterpreted without the deliberate investigation and fact-finding which are available only through the legislative process. Such a substantial departure would have an incalculable impact on all national banks which engage in interstate lending.

ARGUMENT

I. NEITHER THE HISTORICAL CONTEXT NOR THE DIRECT LEGISLATIVE HISTORY SUPPORTS THE "COMPETITIVE EQUALITY" ARGUMENT SUGGESTED BY PETITIONERS. NEITHER THE COURTS NOR THE ADMINISTERING AGENCY HAVE CREATED SUCH PARITY IN DETERMINING MAXIMUM PERMISSIBLE INTEREST RATES FOR NATIONAL BANKS.

In the briefs presented to the Court, much attention is focused on an alleged "policy of competitive equality" between state and national banks under Section 85 of the National Bank Act.[2] In seeking a review of

[2] "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . and

the decision below, Petitioners, in a tangential way, and Amicus Conference of State Bank Supervisors, in a direct way, argue that this is the underlying rationale of the National Bank Act, and that the Court should review the decision below in that context. By making that argument, they challenge the very underpinnings of the national banking system. Before considering the specific issue presented in this case, that is, the ability of a Nebraska national bank to charge interest in accordance with the Nebraska statute on all of its loans, it is essential that this suggestion be disspelled.

This suggestion is simply incompatible with the political climate which existed in the early 1860s and the floor debates which accompanied passage of this section. Applying the plain language and recognizing the historical and legislative setting, this Court has acknowledged that Section 85 establishes a limited advantage for national banks. Furthermore, the discussions by reviewing courts have turned to competitive factors *only* when to do so favors national banks or when not guided by a specific provision of the Act. In the instant case, however, the Act is not silent on the critically important issue of permissible interest rates, since Section 85 is a specific provision describing the rights of national banks with respect to charging interest.

no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . ." 12 U.S.C. § 85, as derived from Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108, as amended by Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191; Act of Aug. 23, 1935, ch. 614, § 314, 49 Stat. 711; Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558.

A. The Political Environment Which Existed During The Early 1860s Was Marked By Clear Support For National Bank Development And Antipathy For State Banks, Belying Any Contemporary Suggestion That Congress Intended A "Policy of Equalization".

Congress did not intend for competitive equality to exist between state and national banks when it enacted federal banking statutes in 1863 and 1864. The exigencies of the Civil War required the federal government to gain control over the monetary system and establish a uniform currency. *See* B. Hammond, *Banks and Politics in America from the Revolution to the Civil War* 723 (1957); Million, *The Debate on the National Bank Act of 1863,* 2 J. Pol. Econ. 251, 270 (1894) [hereinafter cited as Million, *The Debate*]. Congress intended to create a new system of national banks as an agency for the collection of taxes, as depositories for public funds, as a medium for funding a large part of the national debt and to allow the resumption of specie payments. Million, *The Debate* at 270. *See* A. Lincoln, Special Message On Financing The War, *Senate Journal* 121-22, 37th Cong., 3rd Sess. (Jan. 17, 1863).

The purpose of the 1863 Act was not to erect a dual system of competing state and national banks, but rather to supersede the existing system of state banks with national banks. Secretary of the Treasury (later Chief Justice) Salmon P. Chase submitted recommendations on the establishment of a system of national banks to the House Ways and Means Committee, which recommendations formed the core of the 1863 Act. J. Sherman, *Recollections* 271 (1895). Secretary Chase intended that state institutions should be transformed into national institutions. Million, *The*

Debate at 266. Senator John Sherman of Ohio, the Lincoln administration's banking spokesman in the Senate, was convinced that the whole system of state banks was both unconstitutional and inexpedient. J. Sherman, *Recollections* 284 (1895). Senator Sherman's bill contained a clause taxing state banks one percent on their issued notes. Million, *The Debate* at 268 n.1. "Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks." *Id.* at 267. An amendment to the 1863 Act was adopted for the express purpose of easing the conversion of state banks into national banks. *Cong. Globe,* 37th Cong., 3rd Sess. 850 (1863). Following the passage of the 1863 Act, it was widely expected that existing banks would surrender their state charters and reincorporate with national charters under the terms of the new law. B. Hammond, *Banks and Politics, supra,* at 728.

The 1864 revision of the banking act was designed to speed the conversion of state banks to national banks. P. Studenski and H. Krooss, *Financial History of the United States* 154 (2d ed. 1963). Representative Hooper of Massachusetts reported the bill to the House from the Ways and Means Committee.

> In discussing the bill at a later date Mr. Hooper said that the *only* purpose of it was "to amend the Act which established that system, to correct what the observation and experience of the past year had shown to be imperfect, *and to render the law so perfect that the state banks might be induced to organize under it in preference to continuing under their state charters.*"

Million, *The Debate* at 279 (Citing *Cong. Globe,* 38th Cong., 1st Sess. 1256 (1864)) (Emphasis added).

When it became clear that state banks were not responding to the more subtle pressures to convert to national charters which were contained in the 1863 and 1864 statutes, state bank notes were subjected to a prohibitive tax in 1865. B. Hammond, *Banks and Politics, supra,* at 732, 733. Speaking for a 10 percent tax on state notes which he introduced, Senator Sherman stated, "The national banks were intended to supersede the state banks. Both cannot exist together." *Id.* at 733; *Cong. Globe,* 38th Cong., 2nd Sess. 1139 (1865). Sherman's bill, levying a prohibitive tax on state banks, passed March 3, 1865.

It was in this legislative atmosphere that Congress, in 1864, adopted what is now 12 U.S.C. § 85, which Petitioners ask this Court to read as mandating equality of treatment in the charging of interest as between state and national banks. In light of the 1863 and 1864 statutes and the 1865 tax on state banks, it is beyond reasonable doubt that the intent of Congressional efforts in this area was not to preserve and perpetuate state banks but, rather, to eliminate them. This context makes ludicrous any suggestion of a careful, deliberative, clearly enunciated effort to provide state-national bank equality of interest rates.

B. The Congressional Debates Which Accompanied The Passage Of Section 85 Reflect That Congress Intended Not To Create "Competitive Equality" Between State And National Banks, But Rather To Favor National Banks.

When Section 30 of the 1864 Act, now Section 85, was presented to the Senate, two factions debated the all important question of the permissible interest rates on loans to be made by national banks. One side sought to prevent national banks from charging higher interest rates than state banks. The other faction sought to

prevent states from passing interest rate legislation hostile to national banks by allowing other lenders in the state to charge more. *First National Bank in Mena* v. *Nowlin,* 509 F.2d 872, 879-80 (8th Cir. 1975).

Congressional debate centered on whether national banks would be empowered to charge the rate of interest "allowed" by state law to any state lender or would be restricted to the rate of interest "established" for state banks. Congressional opponents of the "allowed" language recognized that it would permit national banks to charge interest rates which any lender could charge, including rates in excess of those permitted to state banks. *Cong. Globe,* 38th Cong., 1st Sess. 2124, 2125 (1864) (remarks of Sen. Grimes). Proponents of the "allowed" language argued that the plight of the state banks could be remedied by state legislation allowing state banks the highest rate of interest permitted to any lending institution. *Id.* at 2126 (remarks of Sen. Sherman).

The battle lines were clearly drawn between senators favoring the expansive term "allowed" and senators favoring the restrictive term "established." The amendment to Section 85 agreed to and submitted by the Senate Committee on Finance contained the term "allowed." *Id.* at 2123. Senator Grimes of Iowa, however, suggested an amendment which inserted "established" for "allowed." Believing that the terms were synonymous, Senator Sherman originally agreed to the amendment and, in fact, moved its adoption. *Id.* at 2125. The ensuing debate, however, quickly demonstrated that many senators did not consider the terms to be synonymous.

Before the "allowed" versus "established" question was resolved, Senator Henderson of Missouri proposed an amendment designed to put national banks "on precisely the same footing" as state banks. *Id.* at 2126 (remarks of Senators Henderson and Doolittle). A roll call vote was begun on the Henderson amendment, but before the result was announced, Senator Henderson withdrew his amendment. Analyzing this series of events, the Sixth Circuit correctly concluded that the amendment, designed to put national banks "on precisely the same footing with state banks so far as this matter of taking interest is concerned" (remarks of Senator Doolittle), was "expressly rejected by the Senate." *Northway Lanes* v. *Hackley Union National Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972).

Having disposed of the Henderson amendment, the question recurred as to the implications of having earlier substituted "established" for the term "allowed." In concluding that this change, effected by his own motion, should be reconsidered and the original language restored, Senator Sherman reiterated his commitment to the proposition that national banks must be allowed to charge rates granted to competing state lending institutions or individuals:

> I know that the amendment [using the term "allowed"] as agreed upon in the Committee on Finance was well and carefully considered, and was intended to confer on these national banks the same privileges that are conferred by the laws of the States on other *associations and individuals,* and therefore, to avoid the controversy, I will move to reconsider the vote on the amendment proposed by the Senator from Iowa which was adopted, and let us have the original amend-

> ment stand just as it was reported from the committee, which I know was considered carefully, and which *will allow those national banks the same rate of interest as is provided for by the local law for the people within their own States.* If the States choose to change their law, they can change it at any time. My own preference, however, as I have already stated, is to establish a uniform rate of interest by our law; but having been overruled on that point, *I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its laws.*

Cong. Globe, 38th Cong., 1st Sess. 2126 (1864) (Emphasis added).

Following further debate, Senator Conness moved to reconsider the vote upon which "established" was substituted for "allowed." *Id.* at 2127. "The motion to reconsider was agreed to." *Id.* Accordingly, the original committee language using the term "allowed" was restored and further consideration of the amendment was "passed over." *Id.* at 2127-28.[3]

This debate and its eventual outcome provide critically important insight into the Congressional response to the suggestion, urged in 1864 by Senators Grimes

[3] A subsequent reference made when later in the consideration of the Act, Senator Sherman was adding an "except" clause to this sentence of Section 85 erroneously refers to "established." *Cong. Globe*, 38th Cong., 1st Sess. 2145 (1864). Given the procedural activity detailed here and the final version of the Act, and contrary to the suggestion contained in the Brief tendered by the Conference of State Bank Supervisors at 31, it is clear that this resulted from a misprint or typographical error. *See* Comment, *National And State Bank Interest Rates Under The National Bank Act: Preference Or Parity?* 58 Iowa L. Rev. 1250, 1256 n.46 (1973).

and Henderson and now by the Petitioners before this Court, that state and national banks should be on an equal basis with respect to maximum interest rates.

Having established the general rule, Senator Sherman further amended Section 85 by inserting, after the first clause which permitted the highest rate in the state where the bank is located, "except that where by the laws of any state a different rate is limited for banks organized under state law, the rate so limited shall be allowed for organizations organized or existing in any such state under this chapter." *Id.* at 2145. Although no specific legislative history accompanies this amendment, the preceding debate which centered on the word "allowed" places beyond reasonable dispute that as used in this amendment "allowed" was intended as a permissive, broadening term and not a restrictive one. In common usage, "allow" means to permit, to let have. *Webster's Third New International Dictionary*, Unabridged (3rd ed. 1976). To interpret this clause as a restriction would be to reject overtly the meaning of this term which was expressly recognized by Congress as being expansive and is commonly used to permit activity which would not otherwise be permissible.

Furthermore, it must be emphasized that the amendment adding the "except" clause was offered by Senator Sherman. It was, of course, Senator Sherman who, as quoted above, felt that the viability of the fledgling national banking system depended upon the authority of national banks to assess interest at the highest rate permitted to be charged by *any* lender.

The debates on Section 85 provide clear evidence as to the relationship between the interest rate to be per-

mitted by Congress to national banks and those allowed by the states to state banks. The prevailing view, indicated by the reference to the "rate *allowed* by the laws of the state," as reinserted by the Senate, demonstrates that national banks were never intended to be limited to a state's general usury rate, but, rather, could look to any rates established or allowed for special transactions or special classes of lenders. Thus, if any lender is exempted from the general usury statute and allowed to charge higher rates, national banks could also charge the higher rate, irrespective of the treatment afforded by the state to state banks.

C. This Court And Other Courts Have Recognized Consistently That Congress Granted National Banks A Preferred Status With Respect To Maximum Permissible Interest Rates.

This historical background and the direct legislative history of Section 85 of the National Bank Act have been the subject of extensive judicial examination and analysis. In interpreting this provision, this Court and many other courts have consistently held that Section 85 authorizes national banks to make loans at an interest rate equal to the highest rate which could be charged by any other lender in the state.

The Petitioners' contention that Section 85 contemplates "competitive equality" was first argued and rejected in a case decided by this Court on January 19, 1874. *Tiffany* v. *National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), held that Section 85 of Title 12 places national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally in each respective state, not necessarily at the rate applicable to state banks which may have a lower

rate. In reaching this conclusion, this Court repeatedly recognized the "spirit" of the National Bank Act, obviously looking to the historical and legislative context in which this section was forged. Noting that the words "and no more" acted to limit only the general rate of interest, this Court determined that the "except" clause formed an exception from the "no more" restriction.

> But if it was intended [that national banks] should in no case charge a higher rate of interest than state banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more" as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the Act, and of all the legislation respecting national banks it is controlling.

85 U.S. (18 Wall.) at 412.

As properly analyzed in *Tiffany*, Section 85 provides "at least equal advantages" to national banks and, in fact, makes them favored lenders. *Id.* It should be noted that "most favored lender" is merely another way of stating that states cannot discriminate against national banks. Simply stated, this phrase means that whatever states allow to any lender, they must allow to national banks. That line of reasoning and analysis has been followed by this and other Courts and relied upon by national banks for the past 104 years. *See, Farmers' & Merchants' National Bank* v. *Dearing*, 91 U.S. 29 (1875); *Hazeltine* v. *Central National Bank*, 183 U.S. 132 (1901); *Evans* v. *National Bank of Savannah*, 251 U.S. 108 (1919); *Barnet* v. *Muncie National Bank*, 98

U.S. 555 (1879); *Daggs* v. *Phoenix National Bank*, 177 U.S. 549 (1900); *Schuyler National Bank* v. *Gadsden*, 191 U.S. 451 (1903). This interpretation remains equally valid today and serves as the basis for much of the interstate lending which has characterized the development of a stable national banking system.

In its tendered Brief, Amicus Conference of State Bank Supervisors urges the Court to overrule *Tiffany* and to place state and national banks on an exactly equal basis with respect to allowable interest rates. It is essential to point out the result which would obtain if this argument were adopted. By tying permissible interest rates exclusively to those allowed to state banks, national banks become completely vulnerable to state legislatures which may choose to discriminate against state banks. This position leaves state banks and, thus, by the Supervisors' reasoning, national banks, susceptible to the shifting attitudes which state legislatures may have from time to time toward their state banks. The stature and status of state banks would directly control national banks. Should state banks, because of specific activities on their part or because more desirable lending entities become available, fall out of favor with state legislatures, national banks would fall with them.

For instance, if a state determined that lending to its citizens could better be carried out by a cooperative entity or even a public lending utility, legislation could be passed to limit state banks to an unrealistically low interest rate. Following the Supervisors' argument, national banks, strictly limited to the rates allowed to state banks, would similarly be placed into jeopardy, thus imperilling the national banking system. The drafters of Section 85 and the early interpretation of this Court recognized that reliance upon continued fair and equitable treatment by state legislation of state banks was an insufficient safeguard to protect national banks. The only future certainty was that in every state some individual or entity would be allowed to charge interest at a reasonable rate. It was for that reason that national banks were permitted to charge the highest interest rate allowed to any lender.

The Petitioners' Briefs and the Amicus Brief tendered by the Conference of State Bank Supervisors urge that the pronouncements of this Court in unrelated areas somehow compel a rereading of Section 85. These contentions are unfounded.

Principal reliance is placed on *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In *Walker Bank*, this Court interpreted *not* the National Bank Act as passed in 1864 but amendments to that Act adopted in 1927 and 1933. 385 U.S. at 257. After discussing the legislative history developed in *1927* and *1933*, this Court arrived at a discussion of "competitive equality."

In its tendered brief, the Conference of State Bank Supervisors quotes from *Walker Bank* to the effect that Congress was embracing a "policy of equalization" of the 1864 Act. That brief failed, however, to point out that this Court began its discussion in the first sentence of the paragraph in which the sentence there quoted appears by clearly limiting the suggested "competitive equality" to the branch banking issue under consideration. "It appears clear from this resumé of the [1927 and 1933] legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive

equality' *insofar as branch banking was concerned.*" 385 U.S. at 261. (Emphasis added).

The other cases cited by Petitioner State of Minnesota and considered by this Court in reaching its decision in *Walker Bank* similarly do not lead to the conclusion that the long-standing meaning of Section 85 has changed. Those cases involve either instances in which this Court recognized "equality" for the purpose of giving *national* banks advantages in order to make them equal with *state* banks or looked to that general principle when silence or the absence of conflicting language in the National Bank Act led this Court to conclude that there was little Congressional interest in the area being regulated.

In *Lewis* v. *Fidelity & Deposit Co. o; Maryland*, 292 U.S. 559 (1934), cited by Petitioner State of Minnesota and relied upon in *Walker Bank*, this Court examined whether a state could require a national bank which served as a depository of state funds to post a surety bond. This Court acknowledged that Congress, in 1930, had adopted an amendment to the National Bank Act, specifically authorizing national banks to provide a bond "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Act of June 25, 1930, ch. 604, 46 Stat. 809. Even recognizing this Congressionally mandated ability of national banks to provide these bonds, this Court noted that this state law could not apply if the state law "interferes with the purposes of its creation, or destroys its efficiency or is in conflict with some paramount federal law." 292 U.S. at 566. Clearly, the imposition of the critical issue of interest rates is one which goes to the very heart of the purpose and efficiency of a national bank.

Furthermore, in *Lewis*, the discussion of equality of competition between state and national banks involved *allowing* national banks a power under the National Bank Act which enabled them to compete against state banks. "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits." 292 U.S. at 565. Clearly, this Court, in *Lewis*, did not, in any way, erode the view set forth with respect to interest rates in *Tiffany*.

Other cases relied upon by Petitioners relate to areas in which the National Bank Act is simply silent or does not contain language which conflicts with state law. Recognizing the all-important nature of interest rates, however, Congress specifically provided for their treatment as discussed above. Other issues, clearly less compelling and certainly less closely related to the success or failure of the national banking system, were not specifically addressed in the Act. On these issues, this Court has, from time to time, in the absence of statutory language, looked to the provisions employed by the states in determining the rules which are to apply to national banks located in those states.

This situation was presented in *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), where this Court held that a Kentucky escheat statute applied with equal force to national banks. The Court specifically looked to determine whether applicable language appeared in the national banking statute. Finding no conflicting language or policy in the national bank statute

which prevented the application of the Kentucky law, the Court held that for purposes of escheat law, national banks located in Kentucky had to follow that law. 321 U.S. at 247-48. To the same effect, *see Waite* v. *Dowley,* 94 U.S. 527 (1876); *McClellan* v. *Chipman,* 164 U.S. 347 (1896).

Tiffany, decided in January 1874, contained a cogent analysis of the language contained in Section 85 viewed by a court interpreting a recently enacted statute. That examination of the "words and spirit" of the legislation is no less valid and applicable today than it was 104 years ago. Recent pronouncements of this Court, authorizing national banks to enjoy the same benefits as state banks or reviewing the responsibilities of national banks in the absence of federal statutory coverage, in no way diminish the rationale or correctness of *Tiffany.*

D. Administrative Interpretation Of Section 85 Allows National Banks To Charge Interest Rates Commensurate With The State's Most Favored Lender.

The "most favored lender" rule, as established by Section 85 and enunciated by this Court, has been incorporated in the regulations of the Comptroller of the Currency, the office specifically charged with administering the Act and regulating national banks. 12 U.S.C. §§ 1, *et seq.*

> (a) A national bank may charge interest at the maximum rate permitted by State law to any competing State chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.

12 C.F.R. § 7.7310 (1977).

As applied to the instant case, this ruling provides that national banks can avail themselves of the interest rate ceiling of the Minnesota small loan statute, even if they do not comply with any of the provisions of that statute other than those relating to the interest rate.

This Court has always given great deference to interpretative regulations issued by the official or agency charged with the administration of a statute. *Udall* v. *Tallman,* 380 U.S. 1 (1965). To sustain the agency's application of a statutory term, the Court "need not find that its construction is the only reasonable one or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial procedings." *Unemployment Compensation Comm'n* v. *Aragon,* 329 U.S. 143, 153 (1946). *See also Gray* v. *Powell,* 314 U.S. 402 (1941); *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583 (1930).

II. SECTION 85 EMPOWERS A NEBRASKA NATIONAL BANK TO CHARGE THE HIGHEST INTEREST RATE ALLOWED BY THE STATE OF NEBRASKA, THE STATE IN WHICH IT IS LOCATED FOR ALL OF ITS LOANS. TO THE EXTENT THAT MINNESOTA LAW IS INCONSISTENT, IT IS PREEMPTED.

A. Section 85 Clearly Entitles A National Bank To Charge The Highest Interest Rate Allowed In The State In Which It Is Located For All Of Its Loans.

The plain meaning of Section 85 is that a national bank can charge the highest interest rate allowed to any creditor of the state *where that national bank*

is located, which may or may not be the same rate allowed state banks. In any event, however, the rate will be at least as much as state banks are allowed.

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

12 U.S.C. § 85.

This controlling first sentence of Section 85 can best be analyzed by focusing on two key phrases, the basic grant of authority and the subsequent "except" clause.

The first clause is a general grant of authority to "charge on *any* loan . . . interest at the rate allowed by the laws of the State . . . *where the bank is located.*" 12 U.S.C. § 85 (emphasis added). This provision is universally applicable to national banks, and it is the only mechanism established by Congress enabling national banks to charge interest. This section authorizes a national bank to charge the *highest* rate of its home state in connection with *all* of the loans that it makes. Both Petitioners have acknowledged that the First National Bank of Omaha, represented by the Respondent, "is located" in Nebraska. Petitioner Marquette National Bank Brief at 16. Petitioner State of Minnesota Brief at 3. Petitioners clearly recognize that "located" in Section 85 refers to the home or charter state of the national bank.

A contrary result is not required by this Court's decision in *Citizens and Southern National Bank* v. *Bougas,*

434 U.S. 35 (1977). In that case, the Court analyzed the venue provisions which applied to national banks pursuant to 12 U.S.C. § 94. The Court held that for purposes of venue in state courts, the federal statute allowed county lines to be ignored when the national bank had "established a permanent business" in a county other than the one reflected in its charter. 434 U.S. at 44 n.10. The Court reached this conclusion after deciding that the physical location of an authorized branch bank in another county would not disrupt a national bank's business or inconvenience it in terms of providing bank records. The *Citizens and Southern* case merely recognizes that when the records which are subject to civil litigation are held by a branch bank in a county other than the national bank's charter county, it is altogether appropriate and possibly more convenient to all parties to allow venue in the branch bank county.

Here, the situation differs both factually and legally. The First National Bank of Omaha has not established a branch or any permanent business location in Minnesota. The legal considerations underlying the application of Section 85 are quite different from those involved in Section 94 and addressed by the Court in *Citizens and Southern.* For example, ignoring county lines for venue purposes does not in any way alter the substantive rights of a national bank. Disregarding state boundaries, however, as sought in the instant case, would be determinative of rights governed by federal law. In short, *Citizens and Southern* neither requires nor would support a decision under Section 85 that First National Bank of Omaha is located in Minnesota as well as Nebraska.

Since First National Bank of Omaha "is located" in Nebraska, it may look to and rely upon the highest rate

of interest permitted there in determining the interest rates which it may charge with respect to *any* of the loans which it makes. The statute neither provides nor suggests a limitation on the use of the term "any," thus making that rule applicable to loans made by the bank irrespective of geographical or political boundaries.

The second or the "except" clause has been discussed earlier in this Brief. *See* this Brief at 13-14. As proposed by Senator Sherman and as properly analyzed in *Tiffany,* this clause provides not a limitation on the general grant of power, but rather, is an "enabling" provision. *Tiffany* at 411.

The meaning of the plain language in Section 85 has been recognized by the U.S. Courts of Appeals for both the Seventh and Eighth Circuits. *Fisher* v. *First National Bank of Chicago,* 538 F.2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); *Fisher* v. *First National Bank of Omaha,* 548 F.2d 255 (8th Cir. 1977). These decisions, together with the decision below, provide uniform judicial agreement as to the application of Section 85.

Both Petitioners commend to the attention of this Court *Meadow Brook National Bank* v. *Recile,* 302 F.Supp. 62 (E.D. La. 1969). That case, which chose to ignore the applicability of federal law to interstate loans by national banks and this Court's holdings in *Tiffany* and subsequent cases, was clearly decided incorrectly. In addition, The Association is constrained to emphasize, as pointed out by the Respondent, that a new trial was ordered in that case following the issuance of the opinion which Petitioners urge this Court to adopt. *See* Brief for Respondent in Opposition to the Petition for Writ of Certiorari, Appendix at 7. It is beyond question that the granting of a new trial has the

impact of vacating the decision earlier rendered. *Allegheny County* v. *Maryland Casualty Co.,* 132 F.2d 894 (3rd Cir.), *cert. denied,* 318 U.S. 787 (1943). A vacated case, of course, is treated as though it had never existed. *Board of Supervisors* v. *Tureaud,* 226 F.2d 714 (5th Cir. 1955); *Stewart v. Oneal,* 237 F. 897, 903 (6th Cir. 1917). This makes wholly inappropriate the Petitioners' suggestion, without explanation, that this vacated case should in any way influence the Court.

B. Because National Banks Are Subject To The Paramount Authority Of The United States, Section 85 Preempts States From Exercising Direct Control Over Interest Rates Charged By National Banks.

Contrary to the conclusory suggestion of the Conference of State Bank Supervisors, Congress was not faced with the cataclysmic choice of (1) ignoring the states and state law or (2) granting national banks the "same authority as state banks." Tendered Amicus Brief at 7. The third alternative, and, in fact, the one adopted, was to look to state law in order to incorporate the highest rate of interest permitted to be charged by any individual or entity. In adopting this alternative, Congress expressly recognized the general authority of the states to establish interest rates, but, as discussed above, rejected the notion that interest rate levels as between state and national banks had to be identical.

Thus, the role that the federal law ascribes to the state in which the national bank is located is to provide the highest permissible interest rate. Once the state law supplies that rate, it becomes part of the federal law and is entitled to traditional concepts of federal supremacy over state law.

As applied here, the federal law incorporates the Nebraska rate of interest. The Minnesota rate is not preempted by Nebraska law; it simply is never incorporated into the federal law. For the purposes of Section 85, as with other federal statutes, once the federal provision is made complete by incorporating the Nebraska rate, the federal law provision clearly preempts any other state law. An attempt to apply the Minnesota rate against federal law, which has incorporated the Nebraska rate, must fail in recognition of the Supremacy Clause. U.S. Const. art. 6, cl. 2.

The power of national banks to charge interest under Section 85 is exclusive of state law because national banks are subject to the paramount authority of the United States, and states cannot interfere with the operations of national banks, except as specifically allowed by Congress. *Farmers' & Merchants' National Bank* v. *Dearing,* 91 U.S. 29 (1875). The provisions of Section 85 fixing the rate of interest which can be taken by national banks are controlling over any state interest laws. *Schuyler National Bank* v. *Gadsden,* 191 U.S. 451 (1903); *Barnet* v. *Muncie National Bank,* 98 U.S. 555, 558 (1879).

In *Davis* v. *Elmira Sav. Bank,* 161 U.S. 275 (1896), the Court held:

> National banks are instrumentalities of the federal government, created for public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government of which they were created.

161 U.S. at 283.

When Congress passed Section 85, it preempted the states from directly legislating such rates. The interest which a national bank charges is not governed by state law, but is governed by federal statute. To the extent that Minnesota law conflicts with the right conferred by the paramount federal statute, it is preempted. This inescapable conclusion was recognized in *Farmers' & Merchants' National Bank* v. *Dearing,* where this Court held that preemption of state law by Section 85 was based upon the Supremacy Clause, and prohibited state actions which conflicted with the federal statute authorizing national banks to charge interest:

> It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land" (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws.
>
> In any view that can be taken of the 30th section [§ 85], the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

91 U.S. at 35.

III. THE ECONOMIC ARGUMENTS MADE BY THE PETITIONERS AND THE TENDERED AMICUS CURIAE BRIEFS DO NOT SUPPORT A REVERSAL OF THE MINNESOTA SUPREME COURT; TO THE CONTRARY, COMPETITION AND AN EFFECTIVE CREDIT MARKET WOULD BE IMPAIRED BY A REVERSAL.

A. Introduction To The Economic Implications Of The Case.

As shown in the preceding parts of this Brief, the legislative history of Section 85, as well as the consistent decisions of this and other Courts in the 114 years since enactment of Section 85, point squarely to the conclusion that a Nebraska national bank may charge interest on its bank credit card loans to Minnesota residents at the highest lending rate permitted by Nebraska, even if the rate applicable to Minnesota state banks is lower. That is and has been the settled rule.

Nevertheless, the Petitioners make several economic arguments that suggest there is something wrong with the rule. The Association believes those arguments are simply not consistent with economic reality as it exists in 1978, and this is a major reason that The Association has moved to obtain leave of Court to file this Brief. The Association wants to point out certain adverse economic and social implications which would result from a reversal of the Minnesota Supreme Court and to challenge the underlying premise of the Petitioners. That premise is that the State of Minnesota and its banks and consumers are being taken advantage of by an out-of-state national bank that may charge a higher interest rate than a Minnesota state or national bank can or does charge. By challenging that premise, The Association is not asking this Court to make value judgments in a complex commer-

cial area. These judgments are best left to Congress. The Association believes strongly, however, that there are sound policy reasons to support the present state of the law as enunciated most recently by the Seventh and Eighth Circuits and the Supreme Court of Minnesota. The arguments made by the Petitioners at the very least cry out for additional empirical study and legislative discussion. Indeed, The Association feels they are just plain wrong in light of consumer credit developments in the past 15 years.

As discussed more fully in the remainder of this part of the Brief, low state interest rate ceilings do *not* protect the consumer; in fact, more often than not, they cause the true cost of credit to be hidden or an unreasonable reduction in the supply of credit to credit-worthy consumers. Moreover, existing data indicate that there is vigorous competition among lenders, as well as increasing awareness by consumers of the cost of borrowing money. In short, there is now a competitive credit market that, unrestrained by price controls, will produce social results fair to consumers, fair to lenders, and beneficial to the economy as a whole. The desirability of allowing competitive factors to operate in Minnesota was acknowledged by Chief Justice Sheran in his concurring opinion in the decision below. *See* Petitioner Marquette National Bank's Petition for Writ of Certiorari at A-45. The decision of the Supreme Court of Minnesota fosters competition in the credit market and should be affirmed.

B. State Usury Laws May Have An Adverse Impact Upon Consumers.

At the highest theoretical level, much of the analysis by those advocating the position of the Petitioners proceeds upon the assumption that state legislative limitations upon interest rates—usury laws—are cornerstones of economic and social policy, and that the lower the legislature has set the rates, the better for the consumer. While that may have been true in Colonial days when the United States inherited usury rate ceilings from the British, it is not the case today. Indeed, there has been an active debate in the literature within the last ten years about the entire theoretical framework of usury laws and the social purposes which they are supposed to serve. *See e.g.,* The Report of The National Commission on Consumer Finance, *Consumer Credit in the United States,* Chs. 6-7 (1972) [hereinafter cited as "*NCCF Report*"]; The National Commission on Consumer Finance, *Technical Studies,* Vol. IV, Ch. 10; Johnson, *Regulation of Finance Charges on Consumer Instalment Credit,* 66 Mich. L. Rev. 81 (1967) [hereinafter cited as Johnson, *Regulation of Charges*]; and Merriman & Hanks, *Revising State Usury Statutes In Light Of A Tight Money Market,* 27 Md. L. Rev. 1 (1967).

The National Commission on Consumer Finance concluded in its Report that:

> On the basis of a summary of the historical approach to the establishment of rate ceilings and institutional knowledge about them the Commission must conclude that, on balance, rate ceilings are undesirable when markets are reasonably competitive. Imposition of rate ceilings on consumer credit transactions neither assures that most consumers will pay a fair price for the use of credit nor prevents overburdening them with excessive debt. The public utility approach to rate making in the field of consumer credit is neither theoretically sound nor feasible although it can serve as a reminder that legislators must recognize the relationship between costs and credit sizes [*sic*] if they do set rate ceilings.

NCCF Report at 108.

It is essential in considering the question of interest to keep in mind that the use of money is like the use of any other good. Money, as a commodity, is no different from hard goods, groceries or other items which can be bought or loaned. Loans are nothing more than the leasing of a commodity (money) at a price (interest) agreed to by the parties. The pervasive system of state rate limitations is really a system of price controls on the amount to be paid for a specific commodity. As with most areas which are subject to price controls, these controls create aberrations in the marketplace and result in dislocations which may impose costs far in excess of any social benefit. If price controls on the cost of money are too low, one of two things may happen: (1) ways will be found by those involved in the transactions to avoid the controls or (2) the availability of loans will decrease and the supply of credit will dry up.

1. *The Rate Ceilings Set By Usury Laws Can Be Avoided.*

The first possibility is that price controls will simply be avoided. In any credit program, the lender looks for a total amount of revenue received to justify economically the investment made in a specific extension of credit. That revenue may be obtained through

one of several sources: interest, service charges, reduction in services provided in connection with credit extensions, different methods of calculation of permissible interest rates[4] and shifting direct costs to persons other than those directly involved in credit transactions. In all of these instances, the lender, by varying some aspect of the transaction or his course of business, is able to sustain the same amount of revenue flow.

Specifically, in conjunction with a credit card, each of the following techniques can be used to change that flow:

1. Increase the interest rate of credit to the consumer;
2. Increase the amount of service charge to the consumer;
3. Use a compounding technique, by adding accrued but unpaid finance charges to the amount upon which additional finance charges are collected;
4. Require that charges be paid "up front" thereby giving the lender the use of the funds;
5. Change the method of determining the amount upon which the finance charge is calculated—for instance, a shift from the adjusted balance method to the average daily balance method or the previous balance method;
6. Impose finance charges as of the date of transaction rather than providing an initial interest-free period;

[4] For an empirical study and discussion of the impact of different methods used by merchants and banks to assess charges on revolving credit, *see* Credit Research Center, Purdue University, Working Paper No. 21, ***Bank and Retail Credit Card Yields Under Alternative Assessment Methods*** (1978).

7. Increase the discount which must be paid by the merchant to the creditor on credit transactions.

Thus, when a lender determines that its rate of interest is at the maximum established by state law, the lender to the extent not prohibited by law simply alters one or more of these factors to sustain an acceptable level of earnings.

Perhaps the best example of the disruptions which result from this kind of shifting of revenues can be seen by examining the impact of a change in the discount charged by a lender to a merchant. In this instance, the credit card company agrees to accept credit transactions generated by a merchant but charges the merchant a certain percentage (or discount) for handling those accounts. If the lender is unable to charge the ultimate consumer a sufficient rate of interest, it has been demonstrated that the lender would maintain the stream of revenues by increasing the discount percentage which must be paid by the merchant.[5] In turn, if the merchant is to maintain his earnings, the increase in discount will be reflected in the price of goods sold to both cash *and* credit customers. Accordingly, cash customers are, in effect, required to absorb a portion of the credit costs attributable to credit customers. The result is subsidization of the credit purchases of middle and upper income con-

[5] Credit Research Center, Purdue University, *Study of Bank Credit Card Profitability For Banks Operating In The States of California and Washington* 13 (1977). The study done by Credit Research Center of the California and Washington credit card markets is extensive and the various papers of Credit Research Center discussing the study are cited frequently hereafter.

sumers by lower income persons who traditionally are unable to obtain credit and must purchase with cash.

A further detrimental effect of revenue shifting brought about by overly restrictive interest rate ceilings is that it disguises the actual cost of credit. Much of the consumer credit legislative and regulatory activity of the past 10 years has focused upon disclosure and greater consumer awareness of the real cost of credit. Interest rate ceilings, which force lenders or merchants to utilize one or more of the techniques identified above, cause the cost of credit to be disguised making it simply unavailable to even informed credit purchasers.

2. *Low Rate Ceilings Decrease The Availability of Credit.*

The second possible result of unrealistically low rate ceilings that cannot either legally or economically be avoided as just described, is that the availability of credit to consumers will diminish, with less credit-worthy consumers being denied credit altogether or particular types of higher risk loans just not being made. *NCCF Report* at 147-49. Once a particular rate ceiling has been established, the question then for the lender is how many consumers have a credit rating that economically justifies a loan with an interest rate at or below the ceiling. For legislators considering rate ceilings, the social and political choice is not solely between a "fair" interest rate and an unfair one for everyone that wants credit; the choice is between the number of consumers that will be able to obtain legal credit at each of the rates under legislative consideration. Those who are denied credit from legitimate lenders may be forced to obtain credit from

any available lender, thus perpetuating the reprehensible practice of loan sharking.

The financial impact upon individual consumers and communities as a whole brought about by the hodgepodge of state interest limitations has been analyzed empirically. Most notable among the studies have been those concerning (and questioning) the 10 percent constitutional usury limitation in the State of Arkansas, made applicable to all forms of credit in the state by the Arkansas Supreme Court's decision in *Sloan* v. *Sears Roebuck & Co.,* 228 Ark. 464, 308 S.W.2d 802 (1957). *See, An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . .",* 1968 U. Ill. L. F. 544; Mitchell, *Usury in Arkansas,* 26 Ark. L. Rev. 263 (1972); and Credit Research Center, Purdue University, Monograph No. 2, *Credit Policies and Store Locations in Arkansas Border Cities: Merchant Reactions to a 10 Percent Finance Charge Ceiling* (1976). The conclusion of the commentators is that retailers in Arkansas compete at a disadvantage with out-of-state merchants and that credit-worthy consumers are being eliminated from the market.

Thus, much of the evidence that has been compiled to date on the efficacy of usury laws suggests that they have done the consumer more harm than good. Professor Johnson put it this way:

> The alleged purpose of rate ceilings has been to achieve a "fair" price to consumers, or a "fair" return to credit grantors. But the great variations among consumers and credit grantors force us to rely upon the effectiveness of shopping by consumers and competition among credit grantors to attain a price that is fair to both parties. The best that rate ceilings can do is to nip the unconscionable transactions which result from joining of an

> unwary or desperate consumer and an avaricious credit grantor. The worst that rate ceilings can do is to distort the market for legal credit, so that consumers are thrust into the hands of illegal lenders.

Johnson, *Regulation of Charges,* 66 Mich. L. Rev. at 113.

Therefore, the answer to economic judgments about the availability and price of the commodity money, lies not in rate ceilings but in a competitive credit market that will in itself assure that consumers pay reasonable rates for the use of money. That is not to say that the credit market is perfect or that all rate ceilings should be immediately removed. Realistic rate ceilings do protect against interest rates completely out of line with economic justification. And, as pointed out by the National Commission on Consumer Finance, rate ceilings should not be eliminated altogether in all areas until workably competitive, less concentrated markets exist so far as lenders are concerned. *NCCF Report* at 147-49. Nevertheless, high rate ceilings which allow active rate competition should be the goal, not the fixing of relatively low, non-competitive rates which discourage the entry of new credit extenders into the market.

The National Conference of Commissioners on Uniform State Laws in adopting the 1974 Final Draft of the Uniform Consumer Credit Code said in the Prefatory Note to the Code that "[i]n advocating primary reliance on the marketplace to control the price of credit, the National Conference has recognized the fundamental importance of competition to permit market forces to operate most effectively, a recognition consistent with the conclusions of the National Commission on Consumer Finance." [1974] Cons. Credit Guide (CCH) Issue No. 315 at xv. In the Comment to the first finance charge section of the Code, § 2.201, the National Conference said the Code's purpose was to "set ceilings and not to fix rates" and "to provide even more effective competition." *Id.* at 69. As shown below, the past 15 years have brought a credit market that is responsive to supply and informed consumer demand, and the price controls of state usury laws hinder, rather than help, those advances.

C. Competition In The Credit Market, Not Price Controls, Assures The Fairest Treatment Of Consumers.

Two reasons traditionally have been cited to justify low interest ceilings, despite the obvious dislocations and distortions which result. They were that there was generally very little consumer awareness as to the cost of credit and that there was a lack of competition among potential lenders. The end result, asserted the proponents of usury limits, was that society could not depend on so imperfect a market to set a "fair" price for money, but instead should turn to price controls. That state of affairs just does not exist today. The past 15 years have demonstrated beyond reasonable question that an effective credit market mechanism now exists in consumer lending.

The available data [6] indicate that there is widespread consumer awareness of the cost of credit due to a general increase in consumer awareness and, specifically in credit areas, the emergence of widespread and uniform disclosures mandated by the Truth in Lending Act, which became effective on July 1, 1969. 82 Stat.

[6] *See, e.g.,* Johnson, *Regulation of Charges,* 66 Mich. L. Rev. at 89-97; and *NCCF Report,* Chs. 7, 10.

146. *See* Senate Comm. on Banking, Housing and Urban Affairs, Truth in Lending Simplification and Reform Act, Report No. 95-720, 95th Cong., 2d Sess. 1-3 (1978). In addition, the recent growth of competition within the lending industry and the expansion of the credit sources available to the consumer *(e.g.,* bank credit cards and credit unions)[7] mean that there is little evidence of any substantial monopoly element on the supply side of the consumer credit industry. Further, to the extent that there are pockets of lender concentration in some states, the concentration may well be the product of low rate ceilings that effectively preclude new entrants into the credit market. Competition—not price control—is the key to a consumer credit market that fairly advances the interest of consumers, of lenders, and of the economy as a whole.

When these principles are considered in light of the decision of the Supreme Court of Minnesota and the contrary arguments of the Petitioners, one thing becomes vividly clear: the stated policy reasons for a reversal of the decision below are simply devoid of rational support. For example, the argument is advanced that the Minnesota statute involved here reflects a clear legislative policy of the State of Minnesota to protect its people from interest rates in excess of 12%. This is not so for at least two reasons. First, while the Minnesota legislature has supposedly provided the consumer with protection of 12% plus $15 in one part of its statute book (§ 48.185), in another part (§ 56.13) it has said it is perfectly all right for a small loan company to charge that same consumer 33% on the first $300 of a consumer loan, 18% on the next $300, and

[7] *NCCF Report, Ch. 2.*

15% on the next $600 for a composite rate of 21.3% on the first $1000. *See* Brief for Respondent in Opposition to the Petition for Writ of Certiorari, Appendix at 2.

Second and more important, the Petitioners are asking this Court to *assume* as the key policy justification for a reversal of the decision below that a Minnesota consumer will pay less interest under a bank card program run by a Minnesota bank than the consumer will pay under the Nebraska bank card program under attack. In fact, the record in this case simply does not allow the Court to make that, or any other evidentiary assumption.

What is known is that aproximately one-quarter of retail card holders and one-third of bank card holders pay no interest charges at all.[8] For those bank card consumers, the Minnesota statute relied upon by the Petitioners gives the Minnesota consumer *less* "protection" from finance charges than does the Nebraska statute that does not allow for any annual service charge. As a result, at least 33% of all those participating in the plan offered under Nebraska rates would actually pay less than they would if they had participated in the program of the Petitioner Marquette National Bank or any other program which included an annual service charge.

Furthermore, if the permissible $15 annual service charge is assessed, the effective rates charged by Min-

[8] R. Shay & W. Dunkelberg, *Retail Store Credit Card Use In New York* 73 (1975); W. Dunkelberg, Credit Research Center, Purdue University, *The Economic Effects Of Effective Rate Ceilings* 16, 22 (1978), *The Transfer Implications Of Consumer Credit Regulation* 12, 30 (1977), and *Credit Cards and Revolving Credit: Retrospect and Prospect* 5-6 (1976) (unpublished manuscripts).

nesota banks on deferred balances of less than $200 exceed the effective rates charged by Nebraska banks. For the consumers who have an average balance of $200 or less, estimated in California to be 47% of all card holders,[9] there is again *less* "protection" under the Minnesota statute.

Thus, the Petitioners are asking the Court to speculate in an evidentiary vacuum that the effective interest rate for consumers who pay interest at the Nebraska rate is greater than if interest is assessed at the Minnesota rate. Indeed, the contrary is true.

Even if, for the sake of argument, it were assumed that the Petitioners are correct—that the evidentiary vacuum now has been filled with evidence that the cost to consumers is greater under the Nebraska rate provisions than under those of Minnesota—then the Court is faced with a somewhat puzzling argument by the Petitioners that someone who is allegedly charging a *higher* interest rate is competing unfairly with the entity charging a lower rate! Put in its most basic terms, the Petitioner Marquette National Bank urges this Court to find, without any supporting data, that a *more costly* charge program has a "substantial, illegal, competitive advantage over petitioner." Petition for Writ of Certiorari at 22.

Common sense and the data concerning consumer awareness of interest rates make that argument implausible at best. A recent study has shown that awareness of interest rates among holders of bank credit

[9] W. Dunkelberg and R. Johnson, Credit Research Center, Purdue University, *CRC's Western Bank Card Study* 10, Ex. 17 (1978) (unpublished manuscript). This study reveals that 47% of bank credit card holders have average unpaid balances of $200 or less.

cards is 80 percent.[10] If the Petitioners are correct that the Nebraska interest is higher, then there is no rational reason why a Minnesota bank charging a *lower* rate cannot compete successfully for the business of Minnesota consumers without the judicial protection of this Court. What the market place calls for is open competition, the end result of which is less expensive and more available credit to all consumers—not price controls that thwart competition and perpetuate monopolies of the type apparently sought by Petitioner Marquette National Bank.

D. The Multi-State Credit Market Would Be Severely Damaged By A Reversal Of The Decision Below.

A more national perspective, rather than the state approach advocated by the Petitioners, is what is called for at a time when many borrowers and lenders are engaged in multistate commerce. Merely to state a few of the statistics confirms what virtually all consumers know from personal experience: credit cards and revolving credit have become one of the major components of retail commerce in the United States.[11] For example, over 60% of all families use at least one credit card. In 1975, consumers used an estimated 330 million such accounts.[12] Large retailers estimate that over half

[10] W. Dunkelberg, Credit Research Center, Purdue University, *The Economic And Distributive Effects Of Credit Regulation* 19-23, Table 15 (1977) (unpublished manuscript).

[11] For discussions of credit card use and its importance to our economy, *see*, R. Shay & W. Dunkelberg, *Retail Store Credit Card Use in New York* (1975); and G. Katona, et al., Survey Research Center, University of Michigan, *1970 Survey of Consumer Finances* (1971).

[12] W. Dunkelberg, Credit Research Center, Purdue University, *The Economic Effects Of Effective Rate Ceilings* 5, 23 (1978) (unpublished manuscript).

of their sales volume is charged on a credit card (although a much lower proportion involves revolving credit).[13] At the end of 1976, estimated outstanding revolving credit balances amounted to $30 billion, revolving credit alone making up about 15% of total consumer credit outstanding.[14] Revolving credit card accounts financed an estimated $80 billion in sales in 1974.[15]

These are economic considerations that bear upon the decision under review by the Court. Involved in this case is a national credit market, not one confined to the boundaries of Minnesota. The case presented here is a decision by the Minnesota Supreme Court that in effect confirms time-honored principles of allowing national banks to engage in interstate transactions and to rely upon a single rate not subject to the limitations imposed by one particular state. The decision below advances interstate commerce, competition and the economy. To accept the Petitioners' argument that commerce is somehow jeopardized by a Nebraska national bank, assumed to be charging a higher interest rate than a competing Minnesota bank, is to ignore economic reality. If the Minnesota national bank wants or needs to increase its rate of interest and thereby extend credit to a greater number of consumers, it can. But, there is no reason under the law or under the principles of a free economy to deny such a decision already made by the Nebraska bank. On the other hand, Minnesota consumers are

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[13] W. Dunkelberg, Credit Research Center, Purdue University, *The Transfer Implications Of Consumer Credit Regulation* 14 (1977) (unpublished manuscript).

[14] *Id.* at 3.

[15] *Id.*

entitled to choose among competing lenders and make their own personal decisions based on the available supply (and cost) of credit. A reversal of the decision below would be economically contrary to such an informed and reasoned decision-making process.

IV. EVEN IF THIS COURT WERE TO DECIDE THAT IN THIS CASE SECTION 85 INCORPORATES MINNESOTA RATHER THAN NEBRASKA INTEREST RATES, NEITHER MINNESOTA NOR NEBRASKA NATIONAL BANKS WOULD BE BOUND BY THE RESTRICTIVE INTEREST RATE IMPOSED BY MINN. STAT. § 48.185.

A. Minn. Stat. § 48.185 Is Precisely The Type Of Statute Congress And Tiffany Anticipated When Expressing Concern About The Treatment Of National Banks.

Minn. Stat. § 48.185 provides for credit card loans and limits the rate of interest which *banks and savings banks* can charge on open-end revolving credit card transactions to 12%. The Petitioners contend that the rate of interest any national bank may charge is limited to the "nondiscriminatory" rate established by Minnesota law for state banks and savings banks, and since national banks fall within the purview of this "nondiscriminatory" statute, they argue that national banks are not allowed to charge the higher interest rates allowed by Minn. Stat. § 56.13.

As a threshold matter, it must be emphasized that the rates actually being *charged* by national banks in Minnesota have no bearing on the rates which they are *allowed* to charge.[16] While Minnesota national banks

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[16] While not an issue here, The Association believes that a national bank may charge the interest rate specified for the most favored lender in the state where the national bank is located or where the loan is made, whichever rate is higher. Thus, if a Minne-

do not currently charge the higher rate allowed under their most favored lender status, that fact has no relevance to the rate allowed to a Nebraska national bank. All national banks are empowered to charge most favored lender rates. Since certain Minnesota interest rates are higher than the Nebraska rates, the alleged disparity which exists between the interest rate *allowed* to Minnesota and Nebraska national banks is illusory. The attempt by Minnesota to restrict either interstate or intrastate national banks by a facially "nondiscriminatory" statute which is discriminatory in effect is in clear violation of the "most favored lender" rule.

Restricting national banks to the interest rate permitted for state banks is *precisely* the result that Congress, in drafting Section 85, and the courts, through *Tiffany* and its progeny, sought to avoid. The reference in Section 85 to the "rate allowed by the laws of the State" does not limit national banks to the rate of interest allowed to state banks, but was meant to include *any* exceptions to that rate established for special transactions or special classes of lenders. *See* Part I of this Brief. Congressional concern centered on state action that would place national banks at a disadvantage as to any state lender. The example most feared was that the states would adopt low rate ceilings for *state* banks, thus unreasonably restricting national banks. It was for that specific purpose that national banks

sota national bank with a bank card program made a loan to a Nebraska consumer, the Minnesota bank could charge interest computed by the Minn. Stat. § 56.13 or the Nebraska rate under attack here. The Association understands, however, that this issue is not before the Court.

were allowed to look beyond the limits imposed on state banks.

This conclusion is directly supported by this Court's analysis in *Tiffany:*

> [Section 85] speaks of allowances to national banks and limitations upon state banks, but it does not declare that the rate limited to state banks shall be the maximum rate allowed to national banks. . . . *[I]f such associations were restricted to the rates allowed by the statute of the State to banks which might be authorized by state laws, unfriendly legislation might make their existence in the state impossible. . . . The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. . . . [Section 85] gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons.*

85 U.S. (18 Wall.) at 412-13 (Emphasis added).

Both legislative intent and judicial construction make clear that national banks are not limited to the interest rates established by Minn. Stat. § 48.185.

B. Minnesota Intentionally Created A Class Of Favored Lenders Of Consumer Credit, And All National Banks Can Charge Equal Rates As Most Favored Lenders.

The Petitioners argue that the purpose of Minn. Stat. § 48.185 is to protect Minnesota residents from excessive interest charges. This assertion is incredi-

ble when viewed in light of the rates expressly permitted to other Minnesota lenders. The righteous indignation and outrage expressed at the interest rate assessed in the program operated by the Respondent (18% per year on the first $999 and 12% per year on amounts of $1,000 or more) is totally out of place when held up to Minn. Stat. § 56.13 which authorizes small loan companies to charge interest at a rate of 33% on the first $300 of a consumer loan,[17] 18% on the next $300, and 15% on the next $600, for a composite rate of 21.3% for the first $1,000.

The specific statutory recognition of the propriety of a maximum interest rate of 21.3% on a $1,000 extension of credit, renders patently absurd the argument that Minnesota must erect a wall against interstate credit in order to protect its citizens from a "usurious" interest rate of 18%.

Because Minnesota has in effect made small loan companies favored lenders under state law, all national banks are allowed to charge as much as this favored lender of consumer credit. Pursuant to *Tiffany; United Missouri Bank of Kansas City* v. *Danforth,* 394 F.Supp. 774 (W.D. Mo. 1975); and *Northway Lanes* v. *Hackley Union National Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972), all national banks are entitled to utilize the interest rates allowed to the most favored lender of consumer credit, notwithstanding the rates permitted to state banks under more restrictive state statutes. As described above, the principal purpose of Section 85 is to anticipate and

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[17] As disclosed in the text accompanying footnote 9 above, in California the percentage of cardholders having an average balance of $200 or less is estimated to be 47%.

defeat state legislation which purports to give any state lender advantages over national banks. *Tiffany.*

Danforth analyzed a Missouri Retail Credit Sales Act that provided maximum interest rates for credit sales which were generally lower than those permitted under the Missouri Small Loan Act. In its decision, the court assumed that the national bank's transactions were within the more restrictive Retail Sales Credit Act, and it recognized that state banks would be limited to the act's restrictive interest rates. Despite these factors, however, the court held that the most favored lender status of national banks would allow them to charge the higher rate applicable under the Small Loan Act. The court stated that it was irrelevant to a determination of a rate permitted to national banks under Section 85 that competing lenders are not actually charging the highest rate permitted, and it was also irrelevant that competing state lenders were not engaging in the same particular type or class of loan or credit transaction as national banks:

> The important determination is whether competing state licensed or chartered lenders *may* engage in the particular type or class of loan, and the rate of interest they *may* charge in connection therewith. Whether [illegible] chartered banks will enjoy parity of inte[illegible] regulation with national banks on similar or identical loan or credit transactions is, under operation of Section 85 of Title 12, left to the state to decide by the enactment of legislation relating to the classification of lenders and interest rates permitted to those classes. . . . Missouri has in effect made small loan companies licensed under that Chapter "favored lenders" in the class of debt encompassed by

> the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act—competitive state-federal equality.

394 F.Supp. at 784-85. (Emphasis by the court.)

The court held that national banks could charge the higher rates of interest authorized by the Small Loan Act on debt incurred under bank credit card operations, and were not limited to the provisions of the Retail Credit Sales Act. The court also indicated that the doctrine of competitive state-federal equality is a competitive equality between national banks and the most favored lender under state law, and not a competitive equality between national banks and state banks.

Thus the court in *Danforth* recognized that if national banks were forced to adhere to the limits of specific categories of loans, skillful legislative drafting could lead to discrimination against national banks. A similar result was reached in *Northway Lanes,* where a national bank was permitted to charge higher rates allowed to a savings and loan association rather than the restrictive rates allowed banks in the state. Because Minnesota has made small loan companies favored lenders in the state, all national banks are entitled to such higher rates.

Even if Minnesota laws, and not Nebraska laws, were held to apply, the Minnesota statute provides a prime example of the type of statute about which the

drafters of Section 85 were concerned. Having provided disparate treatment for state banks, the State of Minnesota now seeks to subject national banks to that treatment. As vividly demonstrated by the Minnesota small loan company law, there is no public policy which would rail against the 18% rate involved in the Respondent's program. The basic concepts which underlie the National Bank Act, as reflected in Section 85, permit national banks which are subject to Minnesota law to charge the maximum interest rate permitted to *any* lender in the state.

V. ANY CHANGE IN THE LONGSTANDING INTERPRETATION OF SECTION 85 SHOULD RESULT FROM CONGRESSIONAL RATHER THAN JUDICIAL ACTION. SECTION 85 AS CURRENTLY APPLIED DOES NOT FORECLOSE THE STATE OF MINNESOTA FROM DETERMINING ITS OWN POLICIES.

A. If There Is To Be Any Change In Section 85, It Should Be Legislative And Not Judicial.

If, despite the important national banking system considerations discussed above for a continuation of the existing rule, there is sentiment that the status afforded to national banks for the past 114 years should now be changed, that change should result from legislative and not judicial action.

Since its enactment, Section 85 has been amended several times. *See* Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191; Act of Aug. 23, 1935, ch. 614, § 314, 49 Stat. 711; and Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558. It is important to note that two of those amendments, including the most recent which was in 1974, actually amended the sentence which Petitioners allege contains an ambiguity that requires a radically new interpretation by this Court. In light of the settled judicial gloss that has been applied to Sec-

tion 85, the absence of subsequent Congressional amendment disturbing that gloss and active Congressional involvement in amending not only Section 85, but the actual sentence being considered, a reversal of the uniform interpretation of this provision would seem to infringe upon well-established legislative authority. This section and the sentence being challenged can hardly be said to have been the subject of Congressional neglect.

Indeed, the *specific question* being addressed in this case is the subject of a proposed amendment to the National Bank Act now pending in the United States Senate. On April 20, 1978, apparently in response to the decision below, Senator Wendell R. Anderson, a senator from Minnesota, introduced S. 2964 which would amend Section 85 of the Act in order to bring about the result which Petitioners seek here through judicial construction.[18]

The economic impact of a reversal would be substantial, would disrupt existing national banking operations and would alter the right of national banks to charge interest in interstate transactions. Any change on an immediate basis would cause needless confusion and disruption. This case involves issues which abound with legislative considerations. The development of the banking system has occupied much Congressional time and attention. Both the House of Representatives and the Senate have created committees charged with the continuing responsibility to analyze and fine tune the laws and regulations governing the financial community. Careful economic, competitive and operational

[18] *See* 124 *Cong. Rec.* S6036-6037 (daily ed. April 20, 1978) (remarks of Sen. Anderson).

analysis involving this complex system requires fact-finding best left to the legislative branch.

As discussed in Part III, the record below is literally devoid of any data with respect to the amount of interstate credit which would be affected by a change of law in this area. An examination of existing statistical resources suggests that a ready answer to that crucial question simply does not exist.

Accordingly, in reversing the meaning attributed to Section 85 by national banks who relied upon the plain wording of the statute and subsequent judicial and administrative interpretations, large numbers of national banks, which are engaged in interstate transactions, may find themselves with millions of dollars of loans which, although clearly appropriate when made, suddenly have become usurious. Furthermore, although desirable, limiting the application of the Court's interpretation to prospective extensions of credit would fail to recognize the millions of credit transactions which occur on a daily basis. These on-rushing transactions could not, in any reasonable way, be brought to an immediate halt. A legislative rule, on the other hand, would allow for prospective applicability, with at least the possibility of a delayed effective date in order to allow implementation of the newly devised provision.

Moreover, the need to develop meaningful statistical data and the complexities involved in fashioning a reasonable rule to resolve this issue, make the question being reviewed uniquely adapted to resolution by legislation. For instance, if the Court should decide that a national bank is to be bound by a multiplicity of state usury statutes, what incidents attributable to consum-

ers trigger the application of one state statute over another? The instant case, which does not involve any consumers, provides no opportunity for the Court to draw an appropriate line as to the point at which both lender and consumer may look to the law of one state rather than another.

Even though the law, as it appears, may lead to what some believe are undesirable results, that is an insufficient basis to depart from the command of a federal statute. *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963). Since the Court should not judicially legislate, *Ebert* v. *Poston,* 266 U.S. 548 (1925); *Holden* v. *Stratton,* 198 U.S. 202 (1905); *Keppel* v. *Tiffin Savings Bank,* 197 U.S. 356 (1905), any change in a doctrine which has been settled for over 100 years and heavily relied upon by virtually all interstate lenders, may most appropriately be resolved by Congress rather than the judiciary.

B. Nothing In This Decision Prevents A State From Determining Its Own Policies.

Petitioners argue that the Minnesota Supreme Court decision in some manner takes away the right of a state to determine the policies which affect its citizens. To a limited extent, of course, this is true whenever federal legislation is adopted. The effect here, however, is simply to create a conflict between inconsistent policy choices which the state is fully able to consider and resolve.

In effect, the State of Minnesota is arguing (1) that a 12% interest rate with a service charge of up to $15 is the highest price its citizens ought to have to pay for credit when obtained from banks, and (2) that there should be interest rate equality between its state

bank lenders and out-of-state bank lenders. These policies, as is the case in many areas, are simply in conflict due to the existence of overriding federal legislation. As a result, a choice must be made as to which policy is the more important. The state, by increasing the interest rates allowed to its state banks, can resolve the second policy concern listed above, although admittedly at the cost of the first. Similarly, it can maintain the interest rates which now apply to state banks, thus satisfying the first policy concern at the cost of the second. In either event, Minnesota is fully able, consistent with federal law, to select its own policy from between conflicting policy alternatives.

CONCLUSION

The Association believes that the Supreme Court of Minnesota correctly decided that national banks may charge interest at a rate provided by the law of the state where the bank is located. That result is not only firmly based in clear legal precedent, but it also is supported by sound economic and social policy. The decision of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

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